Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1790

ROBERT E. DAVIS,

Petitioner,

vs.

GENERAL MOTORS CORPORATION,

Respondent

BRIEF OF RESPONDENT GENERAL MOTORS CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1978.

No. 78-1790

ROBERT E. DAVIS,

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GENERAL MOTORS CORPORATION,

Respondent.

BRIEF OF RESPONDENT GENERAL MOTORS CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a straightforward diversity suit in which the District Court and the unanimous Court of Appeals for the Seventh Circuit concurred in finding that respondent was entitled to summary judgment dismissing petitioner's common law trade secret claim.

The petition presents no special or important reason that the writ should be granted. There is no conflict between the decisions of any Courts of Appeals; the case involves no question of federal law; there is no question of state law which has been decided in conflict with applicable state law; and there has been no departure from the accepted and usual course of judicial proceedings. There is no sound reason this Court should grant the writ.

OPINIONS BELOW

The October 25, 1973 Order by the District Court denying petitioner's motion for a preliminary injunction is unreported and is not included in Petitioner's Appendix (it is reproduced in Respondent's Appendix, *infra,* p. A1.)

The District Court's June 27, 1977 Findings of Fact and Conclusions of Law (on Defendant's Motion for Summary Judgment) is reported at 196 U. S. P. Q. 218 and is reproduced in Petitioner's Appendix at pages 7a-15a.

The December 12, 1978 Order of the Court of Appeals for the Seventh Circuit is not reported and is set forth in Petitioner's Appendix at pages 1a-6a.

QUESTIONS PRESENTED

1. Whether an award of summary judgment to respondent by the District Court, unanimously affirmed by the Court of Appeals, may be attacked on grounds that petitioner was barred from discovery where the discovery was not sought by petitioner for purposes of the summary judgment motion and where the argument was first raised by petitioner after the decision on appeal.

2. Whether the Court below erred in requiring petitioner to set forth specific facts showing that there was a genuine issue for trial where respondent's motion was made with proper support under Rule 56(e), Fed. R. Civ. P.

COUNTERSTATEMENT OF THE CASE

This action was brought by petitioner alleging that he had discovered certain "trade secrets" in relation to the manufacture of automotive emission suppression catalysts, the active constituents of catalytic converters now employed on most new automobiles to convert exhaust gas hydrocarbons and carbon monoxide to harmless vapors. (Complaint, filed May 22, 1973, ¶ 2*.)

The Complaint charged that respondent improperly "obtained information relating to [petitioner's] trade secrets" and that respondent "has divulged, or intends to divulge, said information . . . to other manufacturer or manufacturers of such catalysts and that [respondent] has utilized or intends to utilize, the benefits of [petitioner's] research and technology for [respondent's] own benefit." (Complaint, ¶¶ 8-9.)**

* Citations to record materials not contained in any of the appendices of record are by title and filing date as indicated on the District Court docket index, with appropriate pagination or paragraph references. The Court of Appeals' December 12, 1978 Order is abbreviated "Order." Respondent's Appendix, *infra,* is abbreviated "Res. App." The District Court's Findings of Fact and Conclusions of Law are respectively abbreviated "F/F" and "C/L". The Petition and Petitioner's Appendix are respectively abbreviated "Pet." and "Pet. App."

**On August 23, 1973, petitioner moved for a preliminary injunction. After briefing and submission, on October 25, 1973 the District Court entered an Order denying the motion and holding that:

> [I]t is the opinion of this Court that the plaintiff has failed to meet the requirements necessary for the granting of a preliminary injunction. More specifically, given the present posture of plaintiff's case, mainly based on information and belief, it is not clear that the plaintiff will ultimately succeed on the merits of the instant action. Preliminary injunctions should not be issued merely to allay the fears and apprehension or to soothe the anxieties of the parties.

(Res. App. A1.) No appeal was taken by petitioner from the denial of his request for preliminary injunctive relief.

These allegations were denied by respondent in its Answer filed on July 10, 1973. Accordingly, since that date the questions of whether respondent discovered, used, or disclosed petitioner's alleged trade secrets; whether the catalyst manufacturers, from which respondent purchased its commercial catalysts, employed their own independently developed catalyst technology; and whether petitioner possessed protectible trade secrets were all at issue. All of these questions were pursued by the parties during the three years of extensive discovery conducted prior to the close of liability discovery on June 30, 1976.

After discovery was closed, respondent brought a motion for summary judgment pointing out that petitioner's trade secret claim was no more substantial on the completed pretrial record than it had been at the time of the preliminary injunction ruling. Summary judgment was sought on the grounds that:

1. Respondent did not discover any of petitioner's alleged trade secrets and did not itself use them;

2. Respondent did not disclose any of petitioner's alleged trade secrets to others, in particular to the companies that manufactured the automotive catalysts used by respondent;

3. The catalysts were produced by the manufacturers pursuant to technology independently developed and owned by them; and

4. Petitioner's alleged trade secrets were generally known and part of the state of the art of catalysts and their manufacture, lacked novelty and were therefore unprotectible.

The District Court granted the motion on June 27, 1977, concluding that no genuine issue of material fact existed with respect to any of these grounds for relief. (C/L 10, 11, 16, Pet. App. 14a-15a.)

It is clear from the Findings of Fact and Conclusions of Law (Pet. App. 7a-15a) that the District Court made specific findings on each of the alternative grounds advanced by defendant. (F/F 10-19, Pet. App. 9a-11a.) And, after making these findings, the District Court also held in Conclusion of Law 13 that any one of the alternative grounds was sufficient to warrant dismissal of the Complaint as a matter of law. (C/L 13, Pet. App. 15a.)

On appeal, the Court of Appeals for the Seventh Circuit unanimously affirmed in an Order dated December 12, 1978,* holding that "the district court was correct in finding that there was no material dispute as to the fact that the defendant had made no disclosure of the alleged secrets." (Order, p. 3, Pet. App. 4a.) After the appellate decision, petitioner sought rehearing, arguing for the first time that he had been improperly foreclosed from discovery on the "disclosure" issue on which the affirming order was based.

The petition for rehearing was denied in an order dated February 13, 1979 (Pet. App. 16a) after respondent pointed out that the discovery, about which petitioner complained, had not been sought in connection with the summary judgment motion at all and that petitioner had not raised the issue in a timely fashion in any event.

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* The appeal was disposed of by Order rather than by an opinion in accordance with the Seventh Circuit's publication rule providing for disposition by unpublished order of appeals which "are not of general interest or importance." Circuit Rule 35(c)(2)(ii)(B).

ARGUMENT

I.

THE DECISION BELOW WAS PROPERLY RENDERED ON A FULL AND COMPLETE RECORD.

Petitioner's first two questions in reality involve a single issue —whether a claimed conflict among the circuits or an asserted procedural due process violation can be based on the District Court's ruling continuing until after decision on respondent's summary judgment motion a belated motion by petitioner seeking to reopen discovery. Petitioner argues that he was unfairly precluded from having discovery permitted by Rule 56(f), Fed. R. Civ. P., and that denial of the requested discovery violated procedural due process requirements.

However, the petition is incomplete, inaccurate and conspicuously silent as to a critical fact that forecloses petitioner's argument as a matter of law. The discovery in fact was *not* sought in connection with the summary judgment motion as provided by Rule 56(f); rather, when the District Court asked petitioner's attorney whether the discovery was needed in connection with the summary judgment motion, the attorney expressly stated that the discovery was *not* sought for that purpose. Under these circumstances, it is little wonder that petitioner did not raise the issue before the District Court or even before the Court of Appeals until after the affirming order had been issued.

As the following summary will demonstrate, petitioner's suggestion that he was improperly precluded from discovery on the "disclosure" issue is an egregious misstatement of the record:

1. On February 22, 1977, petitioner filed in the District Court his opposition to respondent's summary judgment motion. The memorandum dealt substantively with the disclosure issue.* No request was made pursuant to Rule 56(f) that the summary judgment motion be deferred pending deposition of the catalyst manufacturers or that other discovery was required.

2. Subsequently, on March 9, 1977, petitioner sought leave to take certain discovery depositions of the catalyst manufacturers' representatives. (Pet. App. 17a-18a.)** In seeking such leave, petitioner did *not* contend that the depositions were needed under Rule 56(f) or that they were otherwise required in order for petitioner to meet respondent's summary judgment motion, nor did petitioner ask the District Court to defer ruling on the summary judgment motion pending the requested depositions. In fact, petitioner's application for leave to take the depositions did not even refer to the question of "disclosure" at all. (Pet. App. 17a-18a.)

3. At the March 9, 1979 hearing on petitioner's motion, the District Court specifically inquired of petitioner's attorney whether he sought to take the requested depositions for purposes of the summary judgment motion. The District Court was told that the discovery was not desired for that purpose:

> The Court: You are not contending that you want to do this before the Court rules on the motion for summary judgment, are you?
>
> Mr. Meyer: No, we are not contending that at this time.

---

* Memorandum in Opposition to Defendants Motion for Summary Judgment, filed February 22, 1977, pp. 16-20.

** It was necessary for petitioner to seek leave to take depositions at that time because the District Court had finally closed discovery on the liability issues in the case as of June 30, 1976, after three years of extensive discovery and after at least 3 previous extensions of the discovery cutoff. (Minute Orders entered November 24, 1975, February 6, 1976, and April 22, 1976; Transcripts of Proceedings, June 16, 1976, p. 2; June 30, 1976, p. 3, filed September 13, 1976).

(Transcript of Proceeding, March 9, 1977, p. 6, Res. App. A4)

4. Since the discovery which petitioner was seeking to take was not sought for purposes of the pending summary judgment motion and since discovery on the liability issue had long been closed, the District Court, in a prudent exercise of discretion, entered an order continuing petitioner's motion pending the ruling on the summary judgment motion. (Minute Order, entered March 10, 1977, Pet. App. 19a; Transcript of Proceeding, March 9, 1977, p. 7, Res. App. A4-A5)

At no time before petitioner requested rehearing in the Court of Appeals was any suggestion made that the discovery that petitioner had sought by its motion was even relevant to the disclosure issue much less that the discovery was needed for petitioner's summary judgment opposition. As noted, petitioner's opposition in the District Court had already been filed before leave to take discovery was sought.

Petitioner's statement to the District Court that the discovery was not sought in connection with the summary judgment motion, coupled with his failure to invoke the provisions of Rule 56(f) before the District Court, is a complete answer to his contention that a ruling on the disclosure issue should have been deferred pending further discovery. Having waived that opportunity before the District Court, it was much, much too late to raise it at the appellate level after the Court had ruled. *Adkins* v. *E. I. du Pont de Nemours & Co.*, 181 F. 2d 641 (10th Cir. 1950), *cert. denied*, 340 U. S. 835 (1950); *Foster* v. *General Motors Corp.*, 191 F. 2d 907, 912 (7th Cir. 1951), *cert. denied*, 343 U. S. 906 (1952).

Petitioner is on no sounder ground in suggesting that the Court of Appeals' decision, which affirmed summary judgment because "there was no material dispute of fact that the defendant had made no disclosure of the alleged secrets" (Order, p. 3, Pet.

App. 4a), involved an issue "which the opposing party did not have the opportunity to develop before the trial court." (Pet., p. 10). The record amply demonstrates that the question of "disclosure" was fully prepared, argued and considered in the Courts below:

1. "Disclosure" has been in question in the case since issue was joined July 10, 1973. (Answer ¶ 9.)

2. Extensive discovery was taken by petitioner on the "disclosure" issue throughout the period up to the close of discovery on the liability issue June 30, 1976. For example, interrogatories were posed with respect to the disclosure issue (*e.g.*, Plaintiff's Interrogatories, filed April 14, 1975); petitioner requested documents concerning respondents' dealings with the catalyst manufacturers (*e.g.*, Plaintiff's Requests, filed April 14, 1975); and petitioner took deposition testimony concerning respondent's dealings with the catalyst manufacturers (*e.g.*, deposition of Julius M. Komarmy, filed September 27, 1976.)

3. Lack of disclosure was one of the bases on which respondent sought summary judgment, and it was carefully considered by the parties. As noted, petitioner briefed the disclosure issue in his summary judgment opposition memorandum, and, as the Court of Appeals observed (Order, p. 3, Pet. App. 4a), petitioner's affidavit attempted to marshall support for his position that the alleged secrets had been disclosed.

4. The disclosure issue was one of the alternative grounds for the District Court's decision. (F/F 5b, 17, C/L 11-13, Pet. App. 8a, 11a, 14a-15a.)

Under the foregoing circumstances, it is ludicrous to suggest that the Court of Appeals decided the case "on grounds which the opposing party did not have the opportunity to develop before the trial court."

Fountain v. *Filson*, 336 U. S. 681 (1949), cited by petitioner, is wholly inapposite to a case such as this where the pivotal issue

was fully prepared and vigorously argued both at the district and appellate court levels. And it is absurd to suggest that *Carter* v. *Stanton*, 405 U. S. 669 (1972), has any application to a case such as this where the summary judgment motion was treated as such at all times and where the District Court's decision was explicated in detailed findings of fact and conclusions of law. (Pet. App. 7a-15a.)

Under all of the circumstances, petitioner's "conflict" and "due process" arguments are foreclosed by the record and are without merit in any event. The petition should therefore be denied.

II.

THE COURTS BELOW CORRECTLY APPLIED RULE 56(e), FED. R. CIV. P.

Petitioner's final argument concerns the application of Rule 56(e), Fed. R. Civ. P., and involves a complaint that the burden of establishing the existence of a genuine issue of material fact was improperly shifted to him. As in the case of his argument concerning the discovery motion in the District Court, petitioner's argument is once again at variance with the record.

The difficulty with petitioner's position is that the Courts below did not depart from the requirements of Rule 56(e); rather, they followed the specific mandate of Rule 56(e) that, once the movant makes out a prima facie case for summary judgment, the opponent must come forward with "specific facts showing that there is a genuine issue for trial." *First National Bank of Arizona* v. *Cities Service Co.*, 391 U. S. 253, 288-290 (1968); *Daily Press, Inc.* v. *United Press International*, 412 F. 2d 126, 134 (6th Cir. 1969); *Ashwell & Co.* v. *Transamerica Insurance Co.*, 407 F. 2d 762, 766 (7th Cir. 1969); *Markwell* v. *General Tire & Rubber Co.*, 367 F. 2d 748 (7th Cir. 1966).

Petitioner's argument ignores the affidavits, deposition and other record evidence from the would-be participants in the

alleged trade secrets disclosure unequivocally denying that it took place. In the face of such a showing, The Courts below could not do other than apply the requirements of Rule 56(e) to petitioner. Petitioner having "been unable to present any facts in his counteraffidavits, or elsewhere, that would prove or support any disclosures" (Order, p. 6, Pet. App. 6a), Rule 56(e) by its terms mandated that summary judgment be entered against him.

In view of the foregoing, *Adickes* v. *Kress & Co.*, 398 U. S. 144 (1970), upon which petitioner heavily relies, is beside the point. Here the District Court and the unanimous Court of Appeals scrutinized respondent's motion papers and petitioner's opposition. Unlike *Kress*, wherein the Court found that the movant had "failed to fulfill its inital burden of demonstrating what is a critical element" of its case (*id.* at 158), in the present case respondent met that initial burden, thereby bringing Rule 56(e) into operation.

For all of these reasons, it is plain that the lower Courts' decision on the disclosure issue was sound. Petitioner has not brought to light any fact dispute that calls into question the award of summary judgment on that ground.

CONCLUSION

No reason has been advanced why the writ should be granted. The Petition is without merit and should therefore be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ROBERT E. DAVIS,
Plaintiff,
vs.
GENERAL MOTORS CORP., a Delaware corporation,
Defendant.
No. 73 C 1302

ORDER

This cause comes on plaintiff's motion for a preliminary injunction.

After carefully examining the relevant pleadings, memoranda, affidavits and exhibits presented by the parties in support of their respective positions, it is the opinion of this Court that the plaintiff has failed to meet the requirements necessary for the granting of a preliminary injunction. More specifically, given the present posture of the plaintiff's case, mainly based on information and belief, it is not clear that the plaintiff will ultimately succeed on the merits of the instant action. Preliminary injunctions should not be issued merely to allay the fears and apprehension or to soothe the anxieties of the parties.

Accordingly, it is hereby ordered that the plaintiff's motion for a preliminary injunction is denied.

Enter:

/s/ William J. Bauer
Judge

Dated: October 25, 1973.

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

ROBERT E. DAVIS,
Plaintiff,

vs.

GENERAL MOTORS CORPORATION,
a Delaware Corporation,
Defendant.

No. 73 C 1302

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Hon. Alfred Y. Kirkland, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on March 9, 1977, at the hour of 10:00 o'clock, a.m.

Appearances:

Messrs, McBride, Baker, Wienke & Schlosser
110 North Wacker Drive, Room 500
Chicago, Illinois 60606
By: Mr. J. Robert Meyer,
appearing on behalf of Plaintiff;

Messrs. Kirkland & Ellis
200 East Randolph Drive
Suite 5900
Chicago, Illinois 60601
By. Mr. Daniel W. Vittum, Jr.,
appearing on behalf of Defendant.

The Clerk: 73 C 1302, Robert Davis v. General Motors.

Mr. Meyer: Good morning, your Honor. J. Robert Meyer for the plaintiff.

Mr. Vittum: Dan Vittum representing the defendant.

Mr. Meyer: This is plaintiff's motion, your Honor. It is a motion for leave to take additional depositions and for the production of documents. The depositions which the plaintiff seeks to take are those of the affiants. Affidavits of those affiants were tendered as support for defendant's summary judgment motion in this case.

The Court: What is the problem? Have we had a discovery cut-off?

Mr. Meyer: Yes, we have, your Honor.

Mr. Vittum: Discovery on liability was cut off June 30th of last year.

Your Honor, these affidavits, although they are relied on by defendant in support of its summary judgment motion filed in December, the affidavits themselves have been in the hands of plaintiff's counsel since a year and-a-half ago, so that certainly they have had more than enough opportunity to pursue the question of the truthfulness of the affidavits and the credibility of the affiants before the discovery cut-off occurred.

Your Honor, we are filing our reply brief in response to the summary judgment motion on Monday of next week. The summary judgment matter will then be fully submitted to your Honor.

It is our position that it would be a useless and futile act to initiate another round of discovery involving third parties in distant parts of the country, inquiring into the confidential documents owned by these third parties while the Court has under submission summary judgment motions, which may very well resolve the entire case.

* * * * *

The Court: Well, before we go any further, if I were to consider this, is it your judgment that this would open up another round of discovery, gentlemen; or are you talking about one more piece of discovery which would then conclude it?

What are we talking about?

Mr. Vittum: It reopens an entire area that has not been opened before, your Honor. Plaintiff has elected not to take any discovery of the third-party manufacturers that supply catalysts to General Motors. These are four different companies located in very different parts of the country and they wish to take depositions and have document production of these third parties.

I would again repeat that this discovery is unnecessary, in the defendant's judgment. Our motion for a summary judgment will be fully submitted as of next month and the necessity to pursue this type of discovery seems to us to be worthless under the circumstances.

The Court: Let us ask you this: We get the final brief next Monday on the motion for summary judgment, by the defendant; is it?

Mr. Vittum: That is correct.

The Court: Depending upon which way I rule, it would make a difference as to the allegations of the importance of this discovery.

Mr. Meyer: That is right.

The Court: You are not contending that you want to do this before the Court rules on the motion for summary judgment, are you?

Mr. Meyer: No, we are not contending that at this time.

The Court: Then I take it my ruling could affect your argument as to whether this expert discovery is needed, right?

Mr. Meyer: Yes, that is correct.

The Court: So that if there was one ruling—and I do not intend to get into the nitty-gritty—but if there was one ruling, for example, it would be less important or it would be mooted.

Mr. Meyer: That is correct, Judge.

The Court: Under another ruling, you would both want to argue as to whether you needed it.

Mr. Meyer: Yes.

The Court: Gentlemen, this case is not going to trial in the next few weeks, regrettably, although it is getting close; because a '73 case has high priority. So I think I will enter and continue

this motion until I have ruled on the motion for summary judgment and then hear your arguments.

Mr. Meyer: Fine.

The Court: As I sit here now, I have not even thought through which result would moot this and which result would make it continue. I have no desire to do it, either; but there is a possibility it will be mooted.

Then I will get the briefs next Monday.

Mr. Vittum: We have a status report set for May 4th, your Honor.

The Court: We are running five to six weeks in getting out opinions. I will enter and continue this motion to open up discovery until May 14. Is that the date of the status call?

Mr. Vittum: May 4th.

The Court: May 4th.

Mr. Meyer: Thank you, your Honor.

The Court: Gentlemen, we are getting into the month and we have a big load. I think we might push that back a little in May. Let us vacate May 4th and make it May 19th. Then we will be sure to have the opinion out well in advance of that date.

Mr. Vittum: Thank you, your Honor.

Mr. Meyer: Thank you, your Honor.

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

ROBERT E. DAVIS,
Plaintiff,

vs.

GENERAL MOTORS CORPORATION,
a Delaware Corporation,
Defendant.

No. 73 C 1302

CERTIFICATE

I, Roscoe C. Giles, Jr., do hereby certify that the foregoing is a true, accurate and complete transcript of the proceedings had in the above-entitled cause before the Hon. Alfred Y. Kirkland, one of the Judges of said Court, in his courtroom at Chicago, Illinois, on March 9, 1977.

/s/ Roscoe C. Giles, Jr.
Official Court Reporter
United States District Court
Northern District of Illinois